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SYMPOSIUM PROCEEDINGS

JUDGE SLOVITER: Professor Rice, your view of the constitutional scheme is that Congress has the power to make surgical excisions to the jurisdictions of the federal courts. I wonder if you would comment on what one of my colleagues might call the worst case scenario. That is, whether Congress could by legislation abolish all inferior federal courts and eliminate all Supreme Court appellate jurisdiction. What then would remain of the judicial power?

PROF. RICE: That is a very interesting question. First of all, when you look at the lower federal courts, it is quite clear that Congress never was required to establish them. Congress has complete authority over the lower courts, and, in theory, Congress could abolish the lower federal courts.

Now, the other question is whether Congress could take away all the appellate jurisdiction of the Supreme Court? It might be instructive to note that on the one hand that is exactly what Justice Owen Roberts said Congress could do.[1] However, there is obviously nothing authoritative on the issue. There is no limit on Congress' power built into article III, section 2.[2] Therefore, in theory, I think the answer is yes—Congress could divest all Supreme Court appellate jurisdiction. I do have a problem related to what Professor Hart talks about in his article.[3] When conjecturing about the problem of the essential role of the Supreme Court, he posited a case where Congress withdrew jurisdiction in everything but patent cases and he thought that that might be beyond Congress'

1. *See* Roberts, *Fortifying the Supreme Court's Independence,* 35 A.B.A.J. 1 (1949).

2. U.S. CONST. art. III, § 2, cl. 2. Clause 2 defines the scope of the Supreme Court's original and appellate jurisdiction as follows:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id.

3. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953).

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article III, section 2 power. I also have a problem with a total use of the exception clause power. I think it is arguable that if Congress attempted to wholly obliterate Supreme Court appellate jurisdiction that it would cease to be an "exception" to jurisdiction within the meaning of the clause. In that situation, Congress would be acting unconstitutionally. However, with that reservation, it is theoretically true, just as Justice Roberts said, that Congress could take away all Supreme Court jurisdiction.

JUDGE SLOVITER: I am not sure. I also read Justice Roberts' article and although I don't remember exactly what he said, I recall him saying that the appellate jurisdiction of the Supreme Court depends on the Judiciary Act.[4] I don't remember Justice Roberts saying, "*all* the appellate jurisdiction of the Supreme Court could be divested," but he may have said it. That is why he wanted to propose a major constitutional amendment to limit Congressional control. However, that is still only one Justice's opinion.

It seems to me that your initial reaction to the question is not much different than Professor Ratner's. Are you saying that there is some credence to essential functions theory?

PROF. RICE: Here is what Justice Roberts said and I quote: "I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court of the United States over state supreme court decisions." [5] Now, I think he is theoretically correct.

JUDGE SLOVITER: That is over state supreme court decisions.

PROF. RICE: If you abolish the lower federal courts, then you would not have jurisdiction over lower federal courts anyway.

MR. KAY: I would like to ask Professor Rice a question. In addition to the limitation you have just mentioned, what other limitations on the exceptions clause would you concede?

PROF. RICE: I do not agree that there are any limitations on Congress' power in terms of the exceptions clause [6] itself. I think Congress' power is as broad in theory as Justice Roberts said it was, although it would be obviously imprudent to exercise it that way. You do have the external limitations which Professor Redish men-

4. The Judiciary Act of Sept. 24, 1789, 1 Stat. 73 (1789).

5. Roberts, *supra* note 1, at 4.

6. U.S. CONST. art. III, § 2, cl. 2. For the text of the exceptions clause, see note 2 *supra*.

tions. These external limitations bind Congress in the exercise of any of its powers—for example the commerce clause. Congress could not pass a statute saying that Blacks may not engage in interstate commerce or that the Supreme Court shall have no jurisdiction over appeals by Blacks. But, those are not limitations arising from article III, section 2. These limitations are the same ones which affect all congressional powers.

MR. KAY: The thing that troubles me about saying, for example, that the equal protection clause [7] is a limitation on the exceptions clause power is this: Congress could enact a statute and section 1 would say, "No access to the federal courts for Blacks." Then section 2 of the statute would say, "No federal court jurisdiction over equal protection cases." Based on what Professor Rice is saying, while section 1 is unconstitutional, section 2 is constitutional and permissible.

PROF. RICE: Well, of course, Congress could say, "there will be no appellate jurisdiction in equal protection cases."

MR. KAY: What I am saying is that the unconstitutionality of section 1 of this hypothetical bill is irrelevant because it could never be contested in a federal court.

PROF. RICE: That is correct, though it could be contested in a state court. I think that is the overriding point. I am not saying that this has been settled by the Supreme Court although the language in the *Klein* [8] case said that if Congress took away jurisdiction over a class of cases, there could be no doubt that such power would be properly exercised. I think the ultimate analysis of the kind of situation that you are suggesting would be to say: "Well, Congress has the power to remove jurisdiction over any and all classes of cases as long as those classes of cases are defined by the nature of the case."

I also think you would have to read into an exercise of exceptions clause power, as well as into the exercise of the commerce power or any other power of Congress, the supervening constitutional prohibitions such as the establishment clause. For example, suppose Congress enacts a statute which says "no Baptist may take an appeal to the Supreme Court." That would be wrong and obvi-

7. U.S. CONST. amend. XIV. While the fifth amendment by its terms imposes no requirement of equal protection on the federal government, the Supreme Court has construed that amendment's due process clause to impose such an obligation. Bolling v. Sharpe, 347 U.S. 497 (1954).

8. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

ously unconstitutional, not because article III, section 2 would limit it, but because it, like every other law is subject to the prohibition in the first amendment and the free exercise clause.

PROF. BATOR: Well, just a quick footnote. I would solve the problem of Mr. Kay's hypothetical statute by saying that you would go to state court to get section 1 invalidated. The state court would have to, and should invalidate section 1. Then there would be a severability problem which I would concentrate on.

MR. KAY: Professor Bator, is your answer to my question that one has no constitutional guarantee to hear the section 1 case in a federal court? If so, do we have a constitutional guarantee that a state court is going to hear the case? Where is that?

PROF. BATOR: It is in the combination of the supremacy clause [9] with the general jurisdiction of the state courts to decide the case. Nothing in article III gives Congress any power to prevent the state courts from enforcing the Constitution. The state courts have the power to invalidate an act of Congress as unconstitutional. That point is really central. When a state court hears a case, it must declare unconstitutional legislation which is invalid under the Constitution. The Congress cannot prevent a state court from exercising that constitutional power.

PROF. RATNER: I would just like to add one additional thing to Professor Bator's remarks. First, if we have a constitutional system of judicial review, the only way it can work is if there is access to the courts. If Congress can cut off all access to the courts, you have no judicial review. If Congress cut off access to all federal courts and to all state courts, you have no remedy for constitutional violations. In addition to that, there is indication in the cases, the *Battaglia* [10] case among others, that there are due process questions. If you claim that what is being done to you is contrary to the Constitution, you are entitled to a hearing. There must be some tribunal in which you can assert the constitutional claim. If

9. U.S. CONST. art. VI, cl. 2. The supremacy clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the contrary notwithstanding.

Id.

10. Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948).

Congress cuts off the jurisdiction of the federal courts, the state courts remain and always have remained able to adjudicate that claim. There is no doubt about that. If Congress then *also* cuts off the jurisdiction of the state courts, there is no tribunal at all. You are denied an opportunity to be heard on a constitutional issue. If you were talking about ordinary statutory policy, Congress might modify that policy in various ways through control of federal and state court jurisdiction. But when you are talking about *constitutional* claims, the due process clause [11] requires that there remain a tribunal available in which you may be heard. Thus, the due process clause is a limitation on congressional power over judicial jurisdiction.

JUDGE SLOVITER: Of course, there is a question as to whether Congress can cut off the jurisdiction of the state courts. You assume that Congress cannot and I think Professor Bator's assumption is also that they cannot. At least I think he said so. Professor Redish wanted to say something about Professor Bator's comments.

PROF. REDISH: I agree with Professor Bator that the ultimate answer to Mr. Kay's hypothetical is that the state courts have a general jurisdiction. They are required to enforce any constitutional matter and they cannot be shut off constitutionally by Congress. But that raises more important issues to me that I would like to address.

I was very troubled by Dr. McClellan's statement and to some extent by Professor Rice's because I think there is something of an inconsistency in the arguments of the anti-federal courts wing of the profession. On the one hand, in cases like *Younger v. Harris* [12] and the line that flows from it, it is suggested that any intimation that the state courts will not be as equally enthusiastic as the federal courts, or as equally competent as the federal courts in enforcing federal constitutional rights, is somehow a tremendous insult to the state courts that has to be avoided. Federal courts and state courts are for all practical purposes assumed to be fungible. And as a technical, historical, constitutional matter, I agree with Professor Bator that that is true. I think we part company after that. Yet people like Professor Rice and Dr. McClellan are arguing that the very reason for shutting off federal court jurisdiction is to allow the state courts to *not do* what the federal courts would do. I

11. U.S. CONST. amend. V. The due process clause provides: No person . . . shall be deprived of life, liberty, or property, without due process of law. *Id.*

12. 401 U.S. 37 (1971).

would think that there is an inconsistency in their position and I would like to have an explanation.

DR. MCCLELLAN: Well, there is one inconsistency on the other side too and it has cropped up during this discussion. It also appears in the literature on this subject. On the one hand, it is claimed that if we deny federal court jurisdiction over a particular class of cases that we are going to produce a problem in uniformity. At the same time, those who oppose the use of the exceptions clause power argue that if we deny jurisdiction over the federal courts, we are going to freeze existing constitutional law and that the state courts would have no opportunity to depart from existing decisions by the Supreme Court. This latter view is based on the erroneous doctrine of judicial supremacy. It seems to me that state judges are free to disregard a Supreme Court decision if the Supreme Court has no jurisdiction over that class of cases, even though the decision may be on the books. It is not clear to me why a state court judge today, after the Supreme Court's jurisdiction has been divested, would have to follow a prior Supreme Court decision. When the federal courts hand down a decision, or for that matter any court, the decision applies only to the parties in the action. The courts do not have the legislative power required to cast a general net over their decisions which would make them apply to all persons.

JUDGE SLOVITER: Well, implicated here is obviously the supremacy clause. Professor Redish.

PROF. REDISH: First of all, I would say that the assumption of the Supreme Court in *Younger v. Harris* [13] is woefully inaccurate. I would agree with Dr. McClellan that the state courts, as a practical matter and not in a technical, constitutional sense, are just not fungible with the federal courts. They will not give you the same justice in interpreting federal rights as the federal courts. Indeed, I am saying that is the very purpose for these proposed limitations on federal court jurisdiction.

I think it is just preposterous to suggest that somehow the state courts are freed from an obligation to enforce Supreme Court precedent once the Supreme Court no longer has jurisdiction. The state courts are bound by the supremacy clause to obey federal law. The Constitution is federal law and in *Marbury v. Madison* [14] the

13. *Id.*

14. 5 U.S. (1 Cranch) 137 (1803).

Supreme Court settled that its interpretations of the Constitution are final. You put those two together and there is no logic for saying that an exercise of Congress' power under the exceptions clause somehow frees the state court from any legal or moral obligation to enforce pre-existing Supreme Court precedent.

DR. MCCLELLAN: I would just say quite hastily here that the supremacy clause does not include the phrase "rules or decisions of the Supreme Court." [15]

PROF. REDISH: *Marbury v. Madison* does. I am reading the two together, the supremacy clause combined with *Marbury*.

DR. MCCLELLAN: You are equating *Marbury* with the supremacy clause?

PROF. REDISH: Yes.

DR. MCCLELLAN: Well, I would argue against that proposition because in *Marbury,* John Marshall very clearly said in defense of judicial review that he was protecting the judicial branch only against an act of Congress. He nowhere said in that case or in any other case that the Supreme Court's decision should be viewed as the "supreme law of the land." That kind of rhetoric does not appear in the Supreme Court reports until 1958, when the Court declared in *Cooper v. Aaron* [16] that its interpretation of the Constitution was identical with the words of the Constitution itself and was therefore the supreme law of the land.

PROF. REDISH: I can see that our interpretations of history differ.

JUDGE SLOVITER: Professor Bator, resolve this.

PROF. BATOR: I think that even if there were not a supremacy clause, it would be an incoherent account of the legal system that says that the decisions of the highest court of the government whose law is being interpreted, should not be seen as an authoritative source of law in subsequent cases being litigated in a different jurisdiction.

Suppose we had a case in Utah, and the Utah court had to decide what was the law of Vermont. Assume that under the applicable conflicts rule, it is the law of Vermont that governs. Assume that there is a clear precedent in the Supreme Court of

15. For the text of the supremacy clause, see note 9 *supra*.

16. 358 U.S. 1 (1958).

Vermont and the Supreme Court of Utah knows what that precedent is. Now, the Supreme Court of Vermont does not have jurisdiction to review or reverse the Supreme Court of Utah on what is the law of Vermont. But it would seem to be an incoherent account of the legal system for the Utah court to say: "What we are doing is announcing the law of Vermont but we are departing from the Vermont Supreme Court's conclusion as to what the law of Vermont is." It would be the same kind of incoherence that undermined the regime of *Swift v. Tyson*.[17] In the end it is not a manageable or coherent or an intelligible way to run a judicial system.

PROF. RATNER: I find this last argument very interesting because what it really says is that we need the appellate jurisdiction of the Supreme Court. That is what this argument really comes down to. It is clear that we have a supremacy clause, and notice the supremacy clause says that the courts of the states are bound by the Constitution. It says that "the Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land; . . . any Thing in the Constitution and Laws of each State to the Contrary notwithstanding." [18]

First, the state courts are bound by the Constitution. State judges also take an oath, as do all judges to support the Constitution. One would suppose that in deciding cases, each judge must look at that Constitution and interpret. It is true that they look at the decisions of other courts, and they are bound by the decisions of higher courts. The reason they are bound is because they are subject to the appellate review of those higher courts. It is the authority of the higher court to reverse that makes the lower court bound or at least strongly obliged to follow the higher court. Even then, it is not quite clear how rigidly the state courts are bound. Some courts have indicated that the duty of the lower courts is to decide what the higher court would decide *now*. And if a lower court thinks that the Supreme Court would not *now* decide what it previously decided, the lower court might say, "I don't think that is any longer Supreme Court doctrine and if I am wrong, the Supreme Court will reverse me."

However, the question of the extent to which lower courts are bound by appellate decisions is of course decided as a practical matter. Because of this appellate review, they must follow the deci-

17. 41 U.S. (16 Pet.) 1 (1842).

18. U.S. CONST. art. VI, cl. 2.

sions of the higher courts very closely. Take away appellate review and you no longer have any institutional controls. What you have left is an obligation of the judge—his solemn obligation to follow the Constitution. When you take away the appellate jurisdiction of the Supreme Court, you designate those lower courts as supreme courts and you tell them "do what you think is right under the Constitution, because you are no longer subject to appellate review by the Supreme Court." And it is the Congress of the United States that tells them that.

Under those circumstances, it is by no means clear to me that those lower federal courts or state courts must follow prior decisions of the Supreme Court of the United States. Particularly when these decisions may or may not be followed by the present Supreme Court which has in the meantime changed in personnel and perhaps ideology.

In addition to this, we are now assuming that Congress has power under the exceptions and regulations clause to take away Supreme Court jurisdiction. So, I am now basing my discussion on that assumption. Under that assumption, what is the purpose behind that plenary power to remove the Court's jurisdiction? It is a check on the broad power of the Court to declare legislative and executive actions unconstitutional. That is the reason. But if we accept that Congress has this check, what happens when Congress says: "We do not agree with what the Supreme Court is doing, therefore, we are going to exercise our check. We are going to take away the Court's authority and confer it upon other courts. Those other courts should now in accordance with their conscience and their oaths make their own decisions with regard to the Constitution."

If you make that assumption about Congress' power under the exceptions and regulations clause, I have great difficulty in seeing how you can then turn around and say that the very courts who have been given the authority of last resort must now follow prior decisions of the Supreme Court which Congress has "checked"—and we assume has checked constitutionally. There is nothing in the Constitution that makes stare decisis a constitutional doctrine. It is appellate jurisdiction that binds.

In *Martin v. Hunter's Lessee*,[19] *Cohens v. Virginia*,[20] and *Ableman v. Booth*,[21] the Supreme Court said if you take away the appel-

19. 14 U.S. (1 Wheat.) 304 (1816).
20. 19 U.S. (6 Wheat.) 264 (1821).
21. 62 U.S. (21 Harv.) 506 (1859).

late jurisdiction of the Supreme Court over the state courts, the state courts will do what they want. Clearly, the Supreme Court seemed to think that under these circumstances the state courts would not be bound by a prior decision of the United States Supreme Court.

PROF. RICE: I think we are getting off into a never-never land here which is increasingly unrelated to what the Constitution really does. The underlying assumption here is the assumption I mentioned at the beginning of my remarks. The organized bar assumes implicitly that Supreme Court decisions themselves have the rank and the order of the language of the Constitution. Indeed, that the language of Supreme Court opinions have virtually the same rank and order as the language of the Constitution. It is an assumption of judicial supremacy and exclusivity which is at war with what the Constitution was intended to do. It involves an assumption that no decision by the Supreme Court can ever be unconstitutional. Think about that. That is really the assumption. No decision by the Supreme Court can ever be unconstitutional.

Let's take the worst case—the *Dred Scott*[22] decision in 1857. Part of the purpose of the fourteenth amendment was to overrule that decision. The Supreme Court in *Dred Scott* enunciated in dicta the principle that human beings, slaves, were not persons, could not be persons—were property. They could not be citizens. Their descendants could not be citizens.

Now, let's consider a theoretical worst case. Suppose the Supreme Court today were to come out and say: "Folks, we have reconsidered our position and we think that the concept enunciated in *Dred Scott* was right—that Blacks, the descendants of slaves, are non-persons." Are you going to tell me that this decision is constitutional? Could anybody in his right mind propose that the state courts would have to rubber stamp that, and say, "well, the Supreme Court has spoken." I think that is patently ridiculous. But in fact, in the issues that are involved in jurisdiction limiting legislation, this is the problem. The situations are exactly alike.

In *Roe v. Wade*,[23] the Court said: "Whether or not the unborn child is a human being, he is a non-person." What bothers me about this whole discussion is that one of the areas that we are talking about—the removal of jurisdiction in the abortion area—involves a Supreme Court decision which held that the offspring

22. 60 U.S. (19 Harv.) 393 (1857).

23. 410 U.S. 113 (1973).

of human beings are non-persons. That is really *Roe v. Wade's* leading concept.

I believe fifty years from now, law review articles will be written expressing wonderment and surprise that the legal profession at this time stood still and not only accepted this interpretation of personhood—that human beings can be defined as non-persons—but actually supported it. It seems to me that it is crucially important to realize that it is possible to have an unconstitutional Supreme Court decision. This is exactly the purpose behind article III, section 2. As the Supreme Court said in *Klein*,[24] article III, section 2 is designed to give Congress the power, to remove such cases as to Congress may seem expedient. To delve into some kind of never-never land analysis of what you would like the Constitution to be is unrealistic because that is what article III, section 2 does. You see what is involved in this controversy is the implicit assumption that the Supreme Court can never, alone of all the branches, do anything unconstitutional.

JUDGE SLOVITER: Mr. Kay, can a Supreme Court decision be unconstitutional—at least until the Supreme Court itself says it was?

MR. KAY: I think that we can all agree that there are Supreme Court decisions which some of us consider to be unconstitutional. I think that that is totally beside the point. However, I think that Professor Rice's use of the *Dred Scott* decision is a good example. *Dred Scott* did involve a personhood issue. Now, to some in our society, the crisis that was created by *Roe v. Wade* is not dissimilar in that regard. However, the exceptions clause power was not exercised in response to the *Dred Scott* decision. The fourteenth amendment was enacted to overturn *Dred Scott*.

The fact is that there are significant drawbacks in utilizing the court jurisdiction removal device, and since we are talking about it, of utilizing section five of the fourteenth amendment,[25] to try to overturn the impact of a Supreme Court decision by simple statute. The point that we keep losing here, the reason we are really here, is not because this is an interesting constitutional dialogue. It is because there are several major constituencies in this country who want to overturn Supreme Court decisions and have not been able to pass constitutional amendments. If they had

24. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

25. U.S. CONST. amend. XIV, § 5. Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

been able to do so, this discussion would be moot. Therefore, I think we really need to look at what is at stake here. The issue is whether we want to redesign the way we have traditionally responded to the constitutional decisions of the Supreme Court. That is what is at stake. The bar is not talking about *Roe v. Wade*. The bar is talking about process and the process that we have used in this country up until now does not allow fifty-one percent of the House, fifty-one percent of the Senate, and a presidential signature to overturn the weight of a Supreme Court decision. That is what is being advocated and so in my opinion that is what we really ought to be focusing on.

PROF. RICE: Judge, may I mention two things and clear up the point that Mr. Kay made? In my opinion, the reason why the article III, section 2 power was not used to rectify *Dred Scott* was that by the time Congress decided to do something about it, the Civil War had been won. Congress did not have to use article III, section 2. Secondly, if we could tomorrow enact a constitutional amendment outlawing abortions, I think that for various reasons it would be a more appropriate remedy.

MR. KAY: Well, the sixteenth amendment is another example of a decision which was overturned by constitutional amendment.[26] Yet there was discussion among members of Congress and even with President Taft as to whether or not a simple statute ought to be used in lieu of the amendment. However, the statutory approach was rejected because it runs the kinds of risks that we have been discussing.

PROF. RICE: That is a better example.

JUDGE SLOVITER: Of course, there is a certain nonpermanence to using the legislative route because as soon as fifty-one percent of the House and fifty-one percent of the Senate change their views, then you may very well have a reversal and you will have a ping pong effect. Professor Redish.

PROF. REDISH: It is amazing to me how people on both sides of this debate disregard the constitutional language that we are

26. U.S. CONST. amend. XVI. In 1895, a sharply divided Supreme Court in Pollack v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895), held that an income tax was a direct tax, which, under article I, sections 2 and 9 of the federal Constitution, required apportionment among the states on the basis of population. The sixteenth amendment, which was ratified on February 28, 1913, provides that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without regard to any census or enumeration." U.S. CONST. amend. XVI.

interpreting. The Constitution does not say, "Congress may overrule a Supreme Court decision." I have no doubt that if Congress passed a law explicitly overruling a Supreme Court decision, that law would be held unconstitutional as a violation of separation of powers. What the Constitution provides is that Congress can curb jurisdiction. It does not enable the Congress to overturn substantive doctrine.

I think it is interesting that Professor Rice on the one hand, talks about our being in a never-never land and on the other hand, he discusses the hypothetical possibility that after the fourteenth amendment, the Supreme Court would reaffirm *Dred Scott.* This argument about an imperial Supreme Court that somehow imposes minority values which are violently inconsistent with the overwhelming social fabric of our society simply has not happened. As decisions have come down like that over the years, the Court has, through processes I do not fully understand, been able to finesse the problem either by reflection, reconsideration or change in personnel—without seriously undermining the Court's function as the primary guarantor of minority rights. I would think that any use of the exceptions clause power, even though I do read it for what it says in the Constitution, other than in a purely housekeeping fashion, is likely to upset the delicate balance that we have established in this country.

JUDGE SLOVITER: I wonder if I can shift for a minute to the inferior federal courts, as some of us here are interested in them. I would like to ask Professor Bator a question. By your suggestion that the state courts rather than the inferior federal courts should be the front line for section 1983 suits,[27] aren't you necessarily eliminating federal court consideration of all fourteenth amendment cases in light of the effect of collateral estoppel which, unlike habeas corpus, applies to 1983 suits?

PROF. BATOR: Yes, I think that is correct. If we tried it, if we shifted 1983 litigation to a system which said that you have to show that the state court remedy was inadequate before resorting

27. 42 U.S.C. § 1983 (1976). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

to 1983, then it would be the case that collateral estoppel would come into play and could prevent later relitigation of the federal constitutional question. However, collateral estoppel could be overcome by a showing that the state court system would not afford a full opportunity to have a hearing.

JUDGE SLOVITER: So that what we really have is not a front line. I mean, I think that it is a misnomer to talk about the state courts as being in the front line of section 1983 adjudication.

PROF. BATOR: Yes, I am not talking only about postponing federal court jurisdiction. I am talking about using federal jurisdiction as a backstop in cases where there has been a failure in state court process.

PROF. REDISH: I thought that I would like to ask a few questions of Professor Bator on this particular point if I could. First, I would like to know how you feel about the civil rights removal legislation which as drafted virtually says what you have said. If you can show there is an inadequate remedy in state court, you would be allowed to remove. However, the Supreme Court has refused to allow anyone to make that kind of jump.

Secondly, do you think there would be serious dangers in terms of creating friction in federalism to allow, authorize, and require federal courts to inquire into the good faith or competency of the state courts? And finally, do you think it would be that easy as a matter of proof to establish as a preliminary matter the inadequacy of the state courts, even if it were in fact the case?

PROF. BATOR: You clearly would run into all kinds of problems. But what we are discussing now is a side question about section 1983 and a lot of other subjects, and I don't think we have an adequate basis to discuss them.

JUDGE SLOVITER: All right then, we will let you get your whacks in at Professor Ratner now.

PROF. BATOR: I think it would be interesting to know what would be the effect, both in theory and in practice, if we did what Professor Rice wants us to do. Professor Rice advocates that a given class of constitutional litigation should go to the state courts with the final decision being made by the state courts; there would be no Supreme Court review. It seems to me that Professor Rice and Professor Ratner have sort of struck up a holy or unholy alliance and are confusing us about what the effect of that situation

would be. Professor Ratner is plainly right that the empirical effect of such a Supreme Court divestiture eventually would be to create or to put pressure in favor of disunity. That is, this structure would create a centripetal force, which would drive things out from the center. The reason for this is that new cases will come along that are not simply repetitions of prior cases and present questions that cannot be answered simply by citing to old Supreme Court decisions. The question is, then, what will happen in going from the old law to new cases where there is no Supreme Court review. The effect will obviously be to create disunity. The pressure in a legal system should be towards the working out of things on a uniform basis; that is how the system is arranged today. That is why I think it would be a very bad, whacky and totally unacceptable system to have no Supreme Court review.

But all that is a very different question than the question of the continuing authoritativeness of such Supreme Court decisions which do exist on the issue and which have relevance in a particular case confronting a state court. Authoritativeness does not depend on jurisdiction to review. It is an incoherent account of the legal system that says that the authoritativeness of a pronouncement of a court depends on that court's jurisdiction to review or reverse another court in some future case.

I would like now to turn to Professor Ratner's methodology in constitutional interpretation. His basic position is: "Look, once we take away the Supreme Court's jurisdiction, we would have all this potential disuniformity and there would also be at least the opportunity for the state courts to disregard the Supreme Court. Should a state court decide to ignore a Supreme Court decision, there is basically nothing that you can do about it. That is a bad system, and after all, we have this wonderful, perfect Constitution and how can we think that the Framers created such a system? The Constitution cannot be read as 'stultifying' itself." That basically is his case for his reading of the exceptions clause.

Professor Ratner's theory seems to me to be unsatisfactory in a very fundamental way. He says that "checks" on the Supreme Court are acceptable provided that they do not "stultify." But Professor Ratner does not tell us what the difference is between checks and stultification. He said, for instance, that it is merely a "check" on the Supreme Court that the President and the Senate, acting together, can pack the Court. But what tells us that this "check" is not a stultification? In the 1930's it was thought to be a major stultification of judicial independence and separation of

powers to think that the Constitution permits such a plan.[28] Do you suppose that if the President and the Senate appoint fifty new Supreme Court justices it would not be a stultification? The fact is one cannot find in the constitution guarantees against its own stultification.

If we had a President who was very popular and had majoritarian support, and this President was reelected, and reelected, and reelected, and reelected, he could dissolve the Supreme Court very easily, legally, and constitutionally. He would just fail to make appointments to the Court until all the justices died. Now that is stultification, right? We would have no Supreme Court.

This act would certainly be anti-constitutional in spirit. However, it is perfectly clear that there is no account of the Constitution which says that the President has no power to do it. The trouble with the Ratner method is that it assumes that the Constitution contains within itself all the necessary guarantees to prevent the system's collapse or from somehow going awry in a fundamental way. I do not think that any document can do that or do it completely with absolute "internal" guarantees.

Therefore, even though I think that the exceptions clause in its nature creates the possibility of a very incoherent and possibly unacceptable system, I nevertheless think its fair reading is just that. That is the danger it creates and we have to live with it. I think that we should realize this and then try to persuade people that it would create a lousy system of government to use the clause.

PROF. RATNER: First, of course the Constitution is not the hypothetical utopian document that Professor Hart referred to[29] and we will never get it. It does not contain everything. But time has shown how important the Supreme Court is to the plan of the Constitution. The Court's role is an aspect of the system that provides efficiency and flexibility. When the Court is called upon to interpret the various clauses, it may ask itself: "What is the overriding constitutional plan? What are the goals?"

Thus, the Court may appropriately interpret these ambiguous phrases which do not contain explicit statements about all the kinds of protections that may be implicit in the plan. And that is why constitutions have to be ambiguous. Ambiguity is an essential of a constitution. John Marshall cautioned: "Remember, it is a

28. Stern, *The Commerce Clause and the National Economy,* 1933-1946, 59 HARV. L. REV. 645, 681-82 (1946).

29. Hart, *supra* note 3, at 1372.

Constitution we are interpreting; not the Internal Revenue Code." [30] (He didn't say the last part, I did.) The Constitution must live for generations. It must be applied to new situations. Therefore, in interpreting the ambiguities of the broad phrases, when the Court is looking for the overriding goals, it may fill in the gaps. Of course, there are gaps.

Now, with regard to the authoritativeness of prior decisions, I am not sure what that word means, but I do not mean to imply that the prior decisions are not relevant and may not be persuasive. Of course the state courts or any courts may, and I assume will, look at the prior Supreme Court decisions. I would like to add emphatically that I am now making the assumption that Congress could exercise the exceptions power in a way that would totally divest the Supreme Court of appellate jurisdiction. I do not agree that it can, but I am making the assumption.

The state courts might be persuaded by these prior Supreme Court decisions. They might be persuaded because of the fact that they are Supreme Court decisions. That is a kind of authoritativeness, but it is not compelled. It is not controlling, and in fact, in the long run, that is all you can say about any court decision. It must in the final analysis persuade, or it will wither away and die.

With regard to the difference between checks and stultification, true, those words are only labels. We use them as generalizations and they cannot precisely delineate all the applications. That is what general terms are for. However, I will try to give you some examples. I will try to apply them to Professor Bator's examples.

The test, as I have tried to indicate, is "does the Congressional action, or whatever the government action is, impair the essential functions of the Court?" I have tried to delineate what those essential functions are in general terms. I think that they are workable in terms of maintaining the uniformity and supremacy of the Constitution and federal law, so that we have one Constitution for all of the country and federal supremacy when there is conflict with state law.

Now, let us take the increase in the size of the Court. I think Professor Bator asked why that isn't stultification, and I will try to show you why it is not stultification. I suggest that it does not impair either of the essential functions. It does not prevent the Supreme Court from acting as the apex court of last resort in order to maintain the supremacy of the Constitution and federal law when a state statute is brought before it. It does not prevent the Supreme

30. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

Court from maintaining uniformity. You may say: "But there has been an increase in the size of the Court—have not the majoritarian political branches stepped in and controlled the decision?" However, note that uniformity and supremacy are still being implemented. And consider how this process works. Congress must first pass a statute to increase the size of the Court. The President, of course, can not do it on his own. That statute must go through the political process. So we assume that Congress is mad enough to pass a statute that authorizes appointments to increase the size of the Court. I may remind you that back in the thirties, it was President Roosevelt who wanted to increase the size of the Court and the Congress who would not do it. See how this check works? The Congress would not increase the Court's size. However, now we assume that Congress does it. But what do they do? They simply give the President the authority to appoint. The President must make the choice. He must choose who is going to be on that Court but, just a minute, he does not quite choose by himself. He has to go back to the Senate to get their approval of his choice. In the operation of those political institutions and the accommodations that must take place, you do not have a stultification of the Court's function at all, and particularly not of the essential functions. The President does not know who he is going to get on the Supreme Court. He knows their names, but he does not really know how they are going to decide. You continue to have an independent Supreme Court that will maintain the uniformity and supremacy of federal law regardless—maybe not regardless—of whatever the President and Congress have done. They have an input. Of course, they have an input. They have a check. If they go that far, they have made known how they feel and that is appropriate. And that is the way the system works. Thus, if the size of the Court is increased, it is a check—not a stultification.

I agree that there is some point at which, if the size of the Court is increased enormously, it ceases to be a Court in the mold that the Constitution and our institutions envision. I guess if you increased the size of the Court by fifty or a hundred Justices you could talk about stultification. But I am not sure. But surely not fifteen or twenty Justices.

Now, suppose the President refuses to make any appointments? Well, wait a minute, he only has a four-year term and if the country does not like what he is doing, he is not going to be there for more than four years. And, all the Justices are not going to die in four years or in eight years. Furthermore, Congress can impeach

the President and that is a big check on him. If the President wants to stultify the Court, he can not do it in two terms. And if he could, Congress could impeach him. The Court could be ultimately destroyed in this manner only if the Congress, more than one president, and a continuing majority of the electorate wanted to do so. And a constitutional crisis would then be created. There are your checks. You do not have to take away the appellate jurisdiction of the Supreme Court, which really undermines judicial review, protection of minorities, and the functions of an apex court. I do not know whether there are other examples but, I suggest to you, that is the way the system works. And that is the way the system ought to work. It is a good system. We do not need to destroy that system by taking away from the one constitutionally created court the essential functions that make the system work.

JUDGE SLOVITER: Professor Rice wanted to comment and after that I think I would like to open up the discussion for questions from the floor. As you can see, the panel can go on indefinitely and maybe some persons in the audience have questions.

PROF. RICE: Just to answer Professor Ratner's remarks, if neither the Senate nor the President knows how the new appointee to the Supreme Court is going to decide cases, how is the appointment of new Justices a remedy for a decision you do not like? The first thing I would like to mention is what Professor Redish has said. He brought up a good point. When I mentioned the *Dred Scott* case, he said that is a sort of never-never land. It is, sure. The Supreme Court coming in and re-affirming the *Dred Scott* decision, now that is quite inconceivable. But *Roe v. Wade* is not. And *Roe v. Wade* is based on precisely the same principle, that whether or not the unborn child is a human being, he is a non-person. It is precisely the same principle as *Dred Scott* where a human being, a slave, was defined as a non-person. *Roe v. Wade* is serious business. We get all excited about Jonestown when 900 people committed suicide or were murdered. And yet we forget that by legalizing abortion, every seven hours of every day, we duplicate the death toll at Jonestown. In human terms, legalized abortion is a catastrophe. It is a dishonor to the legal profession that the organized bar is so unconcerned about it.

I just would want to make another comment—it is sort of repetitive—but I think it is important to make it. Article III, section 2 is itself part of the system of checks and balances. It is a reflection of the fact that judicial supremacy was not intended by

the Constitution. There is, incidentally, also a fundamental right to the maintenance of a system of checks and balances. I think that any fair reading of what the Supreme Court has said, especially on the meaning of article III would indicate that article III is a rather important part of that system of checks and balances.

Therefore, we have to ask ourselves these questions: "Is it possible for a Supreme Court decision to be contrary to what the Constitution intends?" The answer is obviously "yes." Then what remedies are there? I suggest that the use of the exceptions clause is one. Maybe it is not the remedy of choice. Maybe it is not the *best* remedy. There are certainly other remedies: statutory qualification, constitutional amendment, and so on. But it is a remedy.

JUDGE SLOVITER: Are there any questions or have all your questions been answered?

AUDIENCE: I would like to direct a question to Professor Redish with an anticipated response from Professor Rice. I think the most interesting issue that has been raised today is the external limitation on the exceptions clause found in the implied equal protection provision of the fifth amendment. I was surprised that Professor Redish and Professor Rice agreed to a considerable extent on this question. Both agree that legislation excepting Blacks from appeals to the Supreme Court would be unconstitutional. Professor Rice raised the question of an exception for Baptists. I presume that if the Unification Church were singled out for an exception to Supreme Court appellate court jurisdiction, your position would be the same. I want to address a question to Professor Redish and perhaps give him an opportunity to develop his view concerning the scope of the fifth amendment equal protection guarantee.

You argue that given the unconstitutionality of an explicit racial exception to Supreme Court appellate jurisdiction, it is likely that legislation curbing Supreme Court appellate jurisdiction in racial segregation and busing cases would also be unconstitutional. This would be so because such legislation removes rights almost exclusively asserted by Blacks from review and thus is a suspect classification that triggers rigid scrutiny. But would not legislation excepting school prayer or abortion cases from Supreme Court appellate jurisdiction raise serious constitutional questions on the basis of the fundamental interest branch of equal protection that also triggers rigid judicial scrutiny? Don't you give up on the

fundamental interest limitation too easily? Specifically, wouldn't the equal protection aspect of the Court's decision in *Police Department of Chicago v. Mosley* [31] provide a basis for an equal protection attack on these jurisdiction limiting bills?

PROF. REDISH: You raise an excellent question because it really gets to the fundamental issues about equal protection and how they apply here. I think in theory, the abortion cases might be similar to the school desegregation cases because under *Roe v. Wade* a right to an abortion can only biologically be asserted by a woman. While sex discrimination has not received the strict scrutiny of racial discrimination, it has received sort of a twilight zone kind of strict scrutiny. So theoretically, racial and sexual discrimination would be treated similarly. As a practical matter, however, while the Court has recognized neutral limitations which disproportionately impact on Blacks as raising equal protection problems, the Court has not recognized seemingly neutral limitations which have an inescapable effect on women as sexual classification. In the abortion equal protection cases, *Harris v. McRae* [32] and *Maher v. Roe*,[33] you would think the Court could have easily said: "Well, these are regulations affecting the right to an abortion which can only be exercised by a woman, therefore, this is a sexual discrimination." However, the Court didn't say it.

I think there is no equal protection problem in limiting jurisdiction to review school prayer cases because in these cases there is not a unique, well defined, insular minority that uses that right.

You suggest that the equal protection analysis of *Mosley* might be relevant to selective jurisdictional limitations. In *Mosley* the Supreme Court combined the first amendment and equal protection to say that a Chicago ordinance prohibiting picketing near a school, with an exemption for labor picketing, violated equal protection because it affected a fundamental (first amendment) right. A possible argument under *Mosley* would be: "Is not the constitutionality of a bill affecting school prayer the same issue as in *Mosley* because some people want to take advantage of school prayer and

31. 408 U.S. 92 (1972) (ordinance prohibiting all picketing near schools during school hours except labor picketing violated equal protection clause in that it made impermissible distinction between labor picketing and other peaceful picketing).

32. 448 U.S. 297 (1980) (Hyde amendment which prohibited the use of federal funds to pay the costs of medically necessary abortions, does not violate equal protection component of the due process clause of the fifth amendment).

33. 432 U.S. 464 (1977) (no denial of equal protection where state refuses to pay expenses of nontherapeutic abortions for indigent women).

others do not?" However, I think that *Mosley* is distinguishable because under the logic of *Mosley,* at least from the equal protection part of the decision, there would have been no unconstitutionality if Chicago had repassed the ordinance saying, "nobody can picket near the school about anything." This would be true even though the ordinance would have been affecting everybody's first amendment right. Now, there might be a first amendment violation, but it would not be an equal protection violation because everybody is being treated equally—those who want to speak near the school and those who do not want to speak near the school. I think the same is true for the school prayer issue. There may be some people who do object to a ban on school prayer and there are others who do not. But there is no well defined group that has been traditionally subjected to discrimination that would want to take advantage of their status to challenge the ban. So, I do not think that equal protection goes quite that far.

PROF. RICE: I agree, it is a very good question which would be important where the removal of a class of cases impacted on a clearly defined group. I think you may find the answer to the question would be found in the application of an intent, a purposeful discrimination requirement rather than an effects test.

AUDIENCE: Isn't the point of your example concerning the Baptists that it is a discrimination against individuals because of their religious beliefs and it is not a discrimination against a discrete group?

PROF. RICE: No, I think there is a couple of things you could say about that. First of all, where a statute provides that "no Baptist shall take an appeal to the Supreme Court," there will be no appellate jurisdiction of cases where a Baptist was the appellant. You have a criterion that has nothing to do with the authentic nature of the case. But, you also have a clear, purposeful discrimination on the basis of religion. You may find that this would be the way to analyze the hypothetical.

You posit a very interesting question because clearly Congress could not—I think just as in the commerce clause—Congress could not say, "no Baptist can take an appeal." I do not think that they can use covert language if that, in fact, is their purpose. I think that is fairly well established. That does not bother me. That is a limitation not arising out of any inherent limit of article III, section 2, but out of the usual application of the constitutional

restrictions based on equal protection and the Bill of Rights. The purpose of the pending proposals would not be to impose such invidious discrimination.

AUDIENCE: Professor Rice, you state that you believe that the United States Supreme Court which is sworn to uphold the Constitution, may come to an unconstitutional result. You cite *Roe v. Wade,* as support for this proposition. Then at the same time you say that it is proper to leave constitutional adjudication to the state courts because they are sworn to uphold the Constitution. Don't you find your position a little inconsistent?

PROF. RICE: Oh, they can make mistakes, too.

AUDIENCE: And they could make the same mistake as the Supreme Court did in *Roe v. Wade*?

PROF. RICE: Sure, the state courts can make mistakes, too. The question is whether when the Supreme Court makes a mistake, it is considered as if that mistake were written into the very language of the Constitution. That is why Congress is given in article III, section 2, this very strong, very broad power. I am not saying state courts do not make mistakes. Of course, they do. And you would have variant decisions on these cases. And, obviously contradictory decisions cannot both be right. So, sure they can make mistakes.

AUDIENCE: Perhaps fifty mistakes.

PROF. RICE: Sure, anybody can make mistakes. Notre Dame had a losing basketball season.

DR. MCCLELLAN: I would like to add to this discussion Justice Brandeis' candid acknowledgement in *Erie Railroad v. Tompkins,*[34] that the Court's earlier decision in *Swift v. Tyson,*[35] was "unconstitutional."

AUDIENCE: I am going to address my question to the entire panel. I am interested in their reaction to Professor Bator's position on Congressional power over the so-called inferior courts. More specifically, the actual human life bill[36] has as its jurisdictional provision, unless the language has been changed recently, only the removal of jurisdiction from the lower federal courts. The

34. 304 U.S. 64 (1938).

35. 41 U.S. (16 Pet.) 1 (1842).

36. S. 2148, 97th Cong., 2d Sess. (1982).

bill does not impair the jurisdiction of the Supreme Court to review decisions of the state supreme courts. I wonder if anyone on the panel would find that provision in the human life bill to be unconstitutional. In other words, would you disagree with Professor Bator's position?

Secondarily, what do you think, if anything, and this is addressed primarily to Dr. McClellan and Professor Rice, would be accomplished by removing the jurisdiction of the lower courts without removing the jurisdiction of the Supreme Court?

DR. MCCLELLAN: In reference to the human life bill?

AUDIENCE: Yes.

DR. MCCLELLAN: Well, the human life bill does not actually take away jurisdiction of the federal courts. There is a provision in the bill which requires accelerated review of the law by the Supreme Court. So it is really not a typical jurisdictional regulation bill. The primary purpose of the human life bill is to encourage the Supreme Court to reexamine its findings in *Roe v. Wade* regarding personhood. In effect, what the human life bill does is to ask the Supreme Court to take a second look at the scientific findings upon which it based its decision. That is really as far as it goes. It really does not fit very neatly into the jurisdictional regulation problem, as the busing bills or other jurisdictional regulation bills do. Does that answer your question?

MR. KAY: Now you will see why it is useful to have a member of the minority party here. There are many versions of the human life statute. The first version of it, Senate Bill 158[37] on which there was eight days of hearings, does remove lower federal court jurisdiction. But Dr. McClellan is correct. The last version of the human life bill, Senate Bill 2148,[38] does not properly fit into the jurisdictional issues which we are discussing today.

I am really glad, however, that you raised a question on Professor Bator's position because I think that it is important to realize that his position on this issue is generally held to be correct. There is general agreement that Congress has wide latitude to control the jurisdiction of the lower federal courts. However, in practice, many of these bills go far beyond a simple, neutral prospective removal of lower federal court jurisdiction. Senate 158 is an example of a bill which only precludes lower federal court jurisdiction

37. S. 158, 97th Cong., 1st Sess. (1981).

38. S. 2148, 97th Cong., 2d Sess. (1982).

to challenges to statutes that regulate or prohibit abortion. Senate 158 does not remove lower federal court jurisdiction to challenge statutes which give the right to obtain an abortion. I think that you can very effectively make an equal protection argument against Senate 158 on this aspect of the bill. I am not sure how persuasive it is but it is persuasive to me. In effect, the bill keeps out litigants on one side of the issue, while allowing them in if they are proponents of the other side of the issue. Several constitutional scholars have raised serious constitutional concerns with this kind of jurisdiction removal.

The other bill which concerns me is one of the busing bills, Senate Bill 1647,[39] pending before the Senate Judiciary Committee. This bill would remove the lower federal court's contempt power in busing cases and also give the lower court power to automatically dissolve pending cases on the mere request of one of the parties. Therefore, even if one conceded the constitutionality of congressional attempts to remove these controversial issues from the jurisdiction of the lower federal courts, there remain additional constitutional problems with these bills. Many of these bills have gone beyond the relatively narrow jurisdictional issue.

PROF. BATOR: I think that I agree with what Mr. Kay says and maybe I can put it in a somewhat more general way. In principle, the starting point is that Congress is free to take a class of constitutional litigation and say: "It may not be initiated in the federal courts and must be initiated in the state courts." But most of the bills that I have seen contain all kinds of technical problems which may land them in serious constitutional trouble. The point I am making here is that exercising the power to curtail jurisdiction involves many severe technical problems. I can mention two examples. One is the problem that Professor Redish was touching on. If the bill is drafted in such a way that it excluded a class of claims which is congruent with a discrete class of persons, particularly an insular minority, then the bill runs into obvious equal protection problems. Another technical difficulty arises if the court is allowed to exercise jurisdiction, but there are specific exceptions carved out of that jurisdiction for certain, narrowly defined questions. You may run afoul of the point that you can not on the one hand give a court jurisdiction but on the other hand tell it that it must decide the case in an unconstitutional way.

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39. S. 1647, 97th Cong., 1st Sess. (1981).

JUDGE SLOVITER: How about one or more remedies? You were saying they carve out one or more questions, would you comment then on what would happen if Congress carved out one or more remedies?

PROF. BATOR: The remedy issue is even more complicated. It runs into a separate and complicated body of doctrine relating to the mix of judicial and legislative remedies, and the scope of the Congress' power under section five of the fourteenth amendment.

I would like to say one word on the question of what a bill restricting lower court jurisdiction would accomplish. The relevant historical precedent is what was accomplished by the Tax Injunction Act of 1937 [40] and the Johnson Act of 1934.[41] These bills left the Supreme Court untouched. They shifted litigation initially to the state courts. Basically, these bills allow the state courts to bring to bear a somewhat different perspective. The state courts are conscientious and law abiding, as conscientious and law abiding as most courts, including federal courts. But the state courts do bring to bear a slightly different perspective in the development of constitutional law. Their perspective is a legitimate one. I think what Congress had in mind in the Tax Injunction Act is that in developing that branch of constitutional law, it would be useful to have those courts look at the problem in the first instance that are closest to the local scene. That is the *legitimate* purpose such legislation can accomplish.

PROF. REDISH: This is where Professor Bator and I differ significantly. It would seem to me that for the very reason that state courts are closer to the local scene, they are *not* as adequate a protector of federal rights—particularly against the exercise of state authority. In Cook County, where I hang out, the thought of a circuit judge holding unconstitutional a Chicago spying plan is inconceivable. The judge knows that if he reaches such a decision, he is not going to get slated again and he did not get where he is by being politically naive. Now there may be no overt statement of pressure, although in Chicago there probably would be, but even if there were not, the subconscious pressure . . .

40. Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1976). This Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Id.*

41. Johnson Act, 28 U.S.C. § 1342 (1976). This Act provides that "[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a State political subdivision." *Id.*

JUDGE SLOVITER: Not in Philadelphia.

PROF. REDISH: No, certainly not in Philadelphia. The subconscious pressures on the state judges is that there are potentially graver consequences to their making an unpopular decision than there would be for the federal judges. Of course, the federal judges sit geographically in the same city or the same locale as the state judges, but they are certainly insulated from state and federal political authority. So, when we are dealing with the protection of minority rights against majority abuse, I do not think that it is an advantage to be closer to the local authorities in the local scene.

AUDIENCE: It seems as though the panel is starting to allude to the independent judiciary theory of Professor Sager.[42] Sagar says that because the state courts are so close to the local political process and not independent in the sense that they are politically elected, they really can not fairly adjudicate federal constitutional rights. As such, there must be some kind of independent federal judiciary to adjudicate those rights. Therefore, it would be unconstitutional to divest the jurisdiction of both the lower federal courts *and* the Supreme Court. I would like the panel to respond to Professor Sagar's view.

PROF. REDISH: My reading of Professor Sager is slightly different, perhaps a difference in emphasis, but I think it is an important one. Professor Sager does not suggest, as my line of reasoning might lead you to, the conclusion that state courts are inadequate protectors of constitutional rights vis-a-vis state authority. He is not arguing on a due process basis. He is arguing historically. He says, "The salary and tenure provision of article III guarantees the availability of at least one article III court to review constitutional rights." It is sort of a modification of Professor Ratner's theory. It is like a floating essential functions thesis. You can close off the Supreme Court, if you leave the lower federal courts open. Or you can close off the lower federal courts, if you leave the Supreme Court open. But you cannot close them *both* off because to do so would violate the salary and tenure provision in the Constitution.

As sympathetic as I am with that conclusion as a policy matter, his history is just inaccurate. There is no indication that the Framers viewed the situation that way. In fact, the whole Madi-

42. Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17, 61-68 (1981).

sonian compromise which led to Congress' power to create or not create the lower federal courts, recognized that the state courts could be adequate protectors of federal constitutional rights. Although I do not think that the Framer's conclusion is accurate today—it was assumed by them at the time. I think also, you could read the salary and tenure provision to say that if and when Congress used its power to create the lower federal courts, those courts must be independent. It is a kind of separation of powers argument. You can exclude us completely, but if you use us, it is a quid pro quo. You cannot get the stamp of approval of an article III court unless those courts are truly independent. Therefore, if Sager had argued on a due process basis and had limited his argument to state courts vis-a-vis state authority, it would have been more persuasive than his historical argument based on article III with broad application to state court review of Congressional legislation as well.

PROF. RATNER: With regard to Professor Sager's proposal, I agree with Professor Redish that it is a kind of floating essential functions theory. The state courts have from the beginning of the Republic performed the function of deciding federal question cases. The Constitution gives Congress the authority to create the lower federal courts, and it is generally agreed that the authority to create includes the authority to control jurisdiction. So Congress may take away the jurisdiction of the lower federal courts and allow the state courts to decide initially all federal question cases. However, Professor Sager raises a significant question. He says that the state courts cannot perform that constitutional role effectively because they do not have the life tenure and salary protection of federal judges. Therefore, there is a problem in returning to the state courts the authority to make all initial constitutional decisions by eliminating the lower federal courts.

If, however, the Supreme Court has appellate jurisdiction over all constitutional decisions, including state court decisions, there is no problem because the ultimate decision is made by a federal court, which is protected by the tenure and salary provisions of article III. In other words, the essential functions of the Supreme Court are relevant here as well. As long as the Court continues to perform them, there is no serious problem. The whole question of Congressional power over the jurisdiction of the lower federal courts thus becomes less significant if the Supreme Court retains its ultimate appellate authority. It is only if you take away the Supreme Court's appellate authority in the essential cases that there

arises a really very difficult question concerning final constitutional decisions by courts that are not shielded from political pressures by the article III protections. That brings us back to what I suggest is the central issue. The appellate jurisdiction of the Supreme Court is the linchpin of the system.

PROF. BATOR: I would like to take on the general proposition that it is always better to rely on the federal rather than the state courts in interpreting and enforcing the federal Constitution. That is a complicated issue and arises in a lot of different settings. I think to deal with it as a kind of a one shot, "all federal judges versus all state judges and who is more sensitive to the constitution," is a little bit misleading. The problem cannot be solved by war stories about what happened once in Cook County in Chicago. There are war stories about all kinds of judges. For one thing, the correct comparison here is not just between state *trial* judges on the one hand and the federal court system on the other. What we have to fold into the picture is all of the state courts, including state appellate and supreme courts. You are saying that within the entire hierarchy of the state court system you will inevitably find total incompetence, insensitivity, politicization and lack of independence. This proposition is empirically very hard to support.

Another trouble with this proposition is that it proves too much. If the proposition is true, then the strongest case for immediate federal trial court intervention is not when we have a plaintiff with a constitutional claim, but when a defendant is sued or indicted in a state court proceeding. This notion that state courts are somehow deficient is really an argument for total wholesale removal—automatic removal whenever there is a federal defense.

The third trouble with this theory of the state courts lies in the assertion that the federal judiciary is somehow more sensitive to constitutional values and, therefore, federal courts are constitutionally and psychologically a better forum. This argument always assumes that there are only certain sorts of constitutional values. The examples used are always examples about individual liberties against state power. You say: "The state judges will be biased in favor of state power and less sensitive to issues involving individual liberty." But if you look at this kind of litigation, you will see that there are constitutional values on both sides. That is, the argument that the federal Constitution leaves the state free to act as it wishes, that the federal Constitution does not impose coercion

on the state, is *itself* the assertion of a constitutional value. There are constitutional values behind structural claims, such as separation of powers and federalism itself. There are sensitivities to certain kinds of values coming from the state courts that are valuable and themselves reflect constitutional values and were intended to be part of the structure of the Constitution.

JUDGE SLOVITER: We have time for one more question. We have not taken a question from a student or a female for a while. I have to do that.

AUDIENCE: Professor Bator, I am an attorney for the county solicitor and I am constantly frustrated by the feeling that we get in federal court that somehow the state courts are less likely to consider the rights of the individual as compared with the federal courts. Where does that attitude come from?

JUDGE SLOVITER: Professor Bator, she has directed that question to you. I am not sure that you should be harnessed with that view—but, where does it come from?

PROF. BATOR: I am not sure how to respond to that question.

JUDGE SLOVITER: Would you like to answer that, Professor Redish?

PROF. REDISH: Well, I did want to make one comment. It sounds to me that the question is a perfectly good example of why we need the federal courts. The question I think, is openly suggesting or acknowledging, that if she had been in a state court, she would not have been receiving the kind of strict scrutiny that she received in federal courts. I think that just goes further to undermine the assumption of fungibility that the Supreme Court has engaged in in *Younger* between state and federal courts. You may not like what the federal courts are doing. You may prefer what the state courts are doing. But to suggest that they would be equally enthusiastic and equally vigorous in enforcing constitutional rights is plainly incorrect.

JUDGE SLOVITER: I do not think that our panel expected me to ask them to wrap up, but I will and I will do it in the reverse order from which they originally spoke. So starting with Professor Redish, we will have a one minute wrap up.

PROF. REDISH: I would like to make a statement on the issue that Professor Bator and I have been discussing because I tend to

agree with him that the Supreme Court jurisdiction issue while intellectually fascinating, is quite probably more theoretical than real. When we are fighting in the trenches and talking about the trial forums, we have to remember that no matter how competent state courts are, no matter what good faith they are acting in, their primary obligation, burden, and duty is to interpret state law. Thus, they simply cannot be expected to develop the kind of coherent view of federal law that federal judges have. Keeping this fact in mind, I agree that perhaps federal defenses should be allowed to be raised in federal courts initially. There would be some exceptions. Federalism prevents the immediate assertion of federal defenses in a federal court when the defendant is being prosecuted on state criminal charges. Such a right would unduly disrupt the state judicial process. But that is why we have habeas corpus. Once the state judicial process is completed, the federal court can review the state trial proceedings. Therefore, I think it's unfortunate that the Supreme Court in cases like *Stone v. Powell*[43] has cut back so dramatically on the role of the federal courts in habeas corpus once the state proceedings are completed.

PROF. RATNER: I am not sure what "theoretical rather than real" means. I suggest that the question of the Supreme Court's appellate jurisdiction is a very real and important question that underlies all these other questions. Perhaps, "more theoretical rather than real" means that the Supreme Court has not yet had to resolve the question. There has been a good deal of dicta. It has been easy for the Supreme Court to say: "Sure, our jurisdiction is determined by acts of Congress." But they have never had to decide the issue of plenary control. Whether Congress has unlimited control over Supreme Court jurisdiction is a critical issue. As long as the Supreme Court retains appellate jurisdiction, Congress can, with regard to the lower federal courts, exercise plenary control over their jurisdiction, subject to other constitutional limits, and Congress might appropriately return to the state courts some of their historical authority as the courts of first instance in federal question cases. There are arguments on both sides of the latter issue. As long as the Supreme Court retains appellate jurisdiction, the system will work either way. Congress can then exercise a great deal of discretion with regard to lower federal court and state court federal-question jurisdiction. If you take away the Supreme Court's appellate jurisdiction, however, the entire system comes apart.

43. 428 U.S. 465 (1976).

There have been constant attempts made to remove Supreme Court jurisdiction since 1830. These attempts have not yet succeeded, but Congressional efforts are intensifying. Dissatisfaction with the Supreme Court's substantive decisions is behind the efforts to remove jurisdiction. I agree that a majoritarian safety valve is needed. There must be checks on the Court. But removal of jurisdiction is more than a check. It stultifies the Court's essential constitutional role. This is the issue we had better confront while there is still time.

PROF. RICE: I want to say first that I agree with Professor Bator's general opinion of the state courts. I think his was a very excellent analysis of the relevant positions of the state and federal courts. One of the reasons, I suggest, for the current efforts in Congress to remove federal court jurisdiction is that elitism that has become ingrained in the federal judiciary. This is particularly true with regard to the actions of the district courts in such matters as racial balance and busing.

To shift gears for a moment, article III, section 2, is, of course, part of the checks and balances system. It can hardly be said that what the Supreme Court has consistently said on the subject is merely casual dictum. We must remember *Palko* [44] and *Twining* [45] as the precedents under which we operated rather well with quite a degree of flexibility among the states, as to the interpretation of the Bill of Rights. And I offer the recommendation that if we do anything as a result of this Symposium, we ought to reflect more intently on those basic assumptions which seem to have been accepted by the organized bar. These assumptions are based on Supreme Court supremacy and exclusivity in terms of the capacity to interpret the Constitution. The assumption is that what the Supreme Court says, including its rationales, is elevated to the same rank and stature as the language of the Constitution. Those assumptions have to be very critically examined because they, in my opinion, are wrong. If the entire debate surrounding this issue promotes a very searching inquiry into those assumptions, it will have served a good purpose. I hope that it will go further than that, but I think it is very important to examine those assumptions critically.

44. Palko v. Connecticut, 302 U.S. 319 (1937) (fifth amendment's prohibition against double jeopardy does not, through the fourteenth amendment, apply to the states).

45. Twining v. New Jersey, 211 U.S. 78 (1908) (the fourteenth amendment does not incorporate the prohibitions of the Bill of Rights).

MR. KAY: I don't think any of us have a problem with a re-examination of those assumptions. In fact, many of us can agree with several of the points that Professor Rice has raised today. For example, I think we can all agree that in many circumstances uniformity of interpretation is not essential or even advisable. Additionally, I think we can agree that judicial supremacy does not mean judicial exclusivity. It is clear that all three branches have an essential role to perform in enforcing the Constitution.

However, while these are interesting and important points, they have little to do with the court jurisdiction proposals. The issue before us is not whether an issue should be handled in a uniform or a non-uniform manner. The issue before us is if the Supreme Court holds that the Constitution requires a uniform interpretation of an issue, does Congress have the power to undo that uniformity by simple statute? The issue is not whether Supreme Court decisions are the final word on any subject—clearly they are not. Rather, the issue is whether constitutional decisions of the Supreme Court should continue to be given the deference they have been given for the last 200 years.

The court jurisdiction removal proposals are based on the premise that once the Supreme Court has spoken on a constitutional issue, Congress can overturn the Court's decision by simple statute. I suggest we might look at a constitutional decision of the Supreme Court in the same way we look at a presidential veto of legislation. Congress cannot overturn the President's veto by a fifty-one percent majority. It takes two-thirds of the Congress.

Similarly, the way we have operated up until now in this country, is that when the Court speaks on a constitutional issue, a simple Congressional majority cannot alter one of its decisions. Supreme Court decisions, while not the exclusive comment on a topic, should continue to be given the deference they have traditionally been given. We should not remove that deference and permit constitutional decisions to be overturned by simple majorities of Congress.

DR. MCCLELLAN: Three quick points because I know you want to go. First of all, the question was asked whether there was such a thing as an unconstitutional Supreme Court decision. I am again reminded of Justice Brandeis' remark in *Erie Railroad v. Tompkins*[46] where he stated in no uncertain terms that the Supreme Court's earlier decision in *Swift v. Tyson*[47] was uncon-

46. 304 U.S. 64 (1938).

47. 41 U.S. (16 Pet.) 1 (1842).

stitutional. Thus, at least one distinguished Justice or should I say one Supreme Court, has realized that a Supreme Court decision could be unconstitutional.

Second, it seems to me that the court jurisdiction issues in the final analysis are not so much legal as they are political, or rather theoretical in terms of their relationship to the fundamental framework of our government. That is to say, I think that there is an important separation of powers issue involved here with regard to the control of the Supreme Court. If Congress cannot regulate the Court's jurisdiction or control the Court through the exceptions clause, then the Court is basically uncontrollable. The only alternative is the amendment process, but as Sam Ervin said in 1968, "You can't pass Constitutional amendments fast enough to control the Court." [48] It is not a workable solution to rely on the amendment process to check the judiciary. That is not the purpose of the amendment process.

Finally, I think the jurisdiction issue involves fundamental questions of democratic theory. When the Court repeatedly exercises judicial review over state legislatures and over the United States Congress, it is in an undemocratic posture. Perhaps in the short run, we can live with the situation, but over the long haul, we cannot tolerate a completely uncontrollable institution having such dramatic input in a democratic society. It was in anticipation of such usurpations that the Framers gave Congress the tools to curb the power of the court. If the Court should go out of control, the exceptions clause provides for the long term implementation of democratic ideals.

JUDGE SLOVITER: I did not come here to defend the federal judiciary. I do not see that as my role. It is only in the last two years or so that I have become aware of how the federal judiciary is both beleaguered and unpopular. Although I hasten to note as I hope you did that so far we have only heard criticism of the district courts and the Supreme Court (laughter). I asked Dr. McClellan at lunch why there are some adverse feelings in Congress towards the federal judiciary and he suggests that probably the perception of activism by the federal courts has aroused these feelings. I imagine there is also a perception in Washington that federal judges tend to misconstrue Congressional statutes. But

48. *Hearings on the Supreme Court, Before the Subcomm. on Separation of Powers, Senate Committee on the Judiciary,* 90th Cong., 2d Sess., 26 (June 11, 1968) (remarks of Senator Ervin).

unless you sit in the position where you have to make the decisions, it is very hard to understand the judiciary's dilemma. In the first place, when you are dealing with a federal statute, it would be very simple if the federal statute was clear. Unfortunately, and I think we all have to agree, the statutes are not always clear. In many instances, the court simply does not have before it a provision that is needed in order to make a decision. Either by inadvertence, or bad legislative draftsmanship, or because Congress wanted to pass the buck, or because it was politically unpalatable to make the decision, Congress failed to include a crucial provision in the statute. So, you are left with the federal judiciary making what is essentially a legislative judgment because nobody else has done it.

When the federal judiciary is dealing with constitutional questions, it is obviously our constitutional function to arrive at a decision. However, neither I nor my colleagues go out of our way to make a hard constitutional decision unless it is essential. I often walk to work and when I do, I walk through Independence Hall Courtyard. The first year that I was on the bench I had a very difficult, never before decided, esoteric constitutional issue. When I walked through the courtyard, I kept looking up at Independence Hall, trying to exorcise those ghosts so that they could tell me what they had in mind when they put a specific provision in the sixth amendment. Well, I did not get any assistance from them and unfortunately, the minutes of those parts of the constitutional debates are not available because someone got sick. Therefore, there is a big gap in the pertinent history. In circumstances like that you do the best that you can, and if it is activism, it is inevitable.

The final comment I wanted to leave you with is the hope that there will be no error in attribution and that nobody will leave here thinking that *I* ever said that the Supreme Court can make an unconstitutional decision! (laughter).